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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
170

ROLF J. KOLDEN,

Petitioner,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 4,
Beltrami County, Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ROLF J. KOLDEN,

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SELECTIVE SERVICE LOCAL BOARD NO. 4,
Beltrami County, Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on January 28, 1969.

Opinions Below

The opinion of the Court of Appeals is unreported. It is printed in the appendix, *infra*, pp. 1a-10a. The opinion of the District Court is unreported. It is printed in the Appendix, *infra*, pp. 18a-22a. The order of Judge Blackmun of the Court of Appeals, granting injunction pending appeal, is unreported. It is printed in the Appendix, *infra*, pp. 11a-17a.

Jurisdiction

The judgment of the Court of Appeals was entered on January 28, 1969. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

Questions Presented

Petitioner, a third-year graduate student, as of October 1, 1967, was deferred from training and service in the armed forces under Section 6(h)(2) of the Military Selective Service Act of 1967 and 32 CFR § 1622.26(b). Upon returning his Selective Service Registration Certificate and Notice of Classification to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under the Selective Service Regulations, stripped of his deferment, reclassified I-A, and ordered to report for induction. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U. S. C. § 460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate and Notice of Classification in his personal possession, violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations,

3. Do Selective Service Regulations 1617.1 and 1623.5, as construed and applied in this case, and Selective Service Regulation 1642.4 on its face, violate the First Amendment.

Statutes and Regulations Involved

Sec. 10(b)(3), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 560(b)(3) is set out in the Appendix, *infra*, p. 23a.

Sec. 6(h)(2), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 546(h)(2), is set out in the Appendix, *infra*, p. 23a.

Selective Service Regulation 1622.26; 32 C.F.R. § 1622.26, is set out in the Appendix, *infra*, p. 25a.

Selective Service Regulation 1642.4; 32 C.F.R. § 1642.4, is set out in the Appendix, *infra*, p. 26a.

Selective Service Regulation 1617.1; 32 C.F.R. § 1617.1, is set out in the Appendix, *infra*, p. 26a.

Selective Service Regulation 1623.5; 32 C.F.R. § 1623.5, is set out in the Appendix, *infra*, p. 27a.

Statement of the Case

Petitioner, on October 16, 1967, and at all pertinent times thereafter was a third-year graduate student at Harvard University (R. 2)[1] and was classified II-S. On Octo-

[1] The Statement of the Case is taken from the opinion below. "R." references are included only where supplementary facts are added. "R." refers to petitioner's separate Appendix filed in the Court of Appeals and which is part of the record filed with the Clerk of the Court.

ber 16, 1967, he turned in his Selective Service Registration Certificate and Notice of Classification to an officer of the government at a meeting protesting the Vietnam war (R. 2). On November 8, 1967, petitioner informed his local draft board, respondent here, that he had surrendered his draft cards. Pursuant to 32 C.F.R. §§ 1642.4(a) and 1642.12, the local board on December 1, 1967 declared petitioner delinquent[2] and, on the same date reclassified him I-A for failure to comply with 32 C.F.R. §§ 1617.1 and 1623.5, which require Selective Service registrants to have their Registration Certificates and Notices of Classification in their personal possession.

After denial by the state appeal board, on February 1, 1968, of petitioner's timely appeal of his I-A classification, his local board ordered him to report for induction the latter part of February, 1968. That induction date was postponed by the State Selective Service Director to allow the district court to hear petitioner's application for a temporary injunction.

On February 22, 1968, petitioner filed suit in the United States District Court, District of Minnesota, to enjoin his induction. On April 9, 1968, the district court issued an order denying the motion for a temporary injunction on the grounds that a decision on the merits would require a review of the propriety of petitioner's reclassification and such review at that posture of the case was prohibited by § 10(b)(3) of the Military Selective Service Act of 1967. Petitioner appealed from that order. While his

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[2] The Delinquency Notice (SSS Form 304) is set out in the Appendix, *infra*, p. 32a. Also set out in the Appendix, *infra*, pp. 28a-31a, are Local Board Memorandum No. 85, dated October 24, 1967, and the General Hershey letter of October 26, 1967, urging reclassification of registrants who surrendered their draft cards or who performed other acts thought by General Hershey to impair the national interest.

appeal was pending, his local board ordered him to report for induction on July 17, 1968. Petitioner applied to Judge Lord of the district court for an injunction or stay pending appeal. The application was denied. On July 16, Judge Blackmun of the Eighth Circuit, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, granted petitioner's application for an injunction pending appeal to the Court of Appeals. Judge Blackmun's order is set out in the Appendix, *infra*, pp. 11a-17a.

The Court of Appeals affirmed on January 28, 1969. It held that " . . . where, as here, a registrant is deprived of a deferment that had been granted as a matter of administrative grace in the first instance, the courts can review the classification only in a criminal prosecution in a habeas corpus proceeding." App., *infra*, p. 9a. The court followed the decision in *Gabriel* v. *Clark*, 37 U. S. L. Week 3217, and rejected the analogy to *Oestereich* v. *Selective Service System Local Board 11*, 37 U. S. L. Week 4053.[3]

Reasons for Granting the Writ

1. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich* v. *Selective Service Local Board No. 11*, 37 U. S. L. Week 4053.

Oestereich v. *Selective Service*, *supra*, stands for two propositions: first, that delinquency reclassification is unlawful if the registrant involved qualified for a statutory exemption, and, second, that a bona-fide claim of such an

[3] It should be noted that the Court of Appeals may have been mislead by its belief that this Court had already refused to stay the induction in a delinquency reclassification case of an *undergraduate* II-S. See App., *infra*, p. 9a, note 6, where the Court of Appeals refers to *Shiffman* v. *Selective Service*, 391 U. S. 930 (1968), as such a case. *Shiffman* was in fact a II-A occupational deferment case.

unlawful reclassification is entitled to pre-induction judicial review despite the language of Section 10(b)(3).

Petitioner here, unlike *Breen* v. *Selective Service*, No. 1144, this Term, does not claim that his deferment is mandatory by the terms of the statute. Section 6(h)(1), involved in *Breen*, says that undergraduate students "shall" be deferred. Section 6(h)(2), involved here, authorizes the President to "provide for the deferment . . . of persons . . . in graduate study . . . found to be necessary to the maintenance of the national health, safety or interest." Pursuant to this authority, Reg. 1622.26 provides that "Any registrant who is entering his second or subsequent year of post-baccalaureate study without interruption on October 1, 1967, may be placed in Class II-S if his school certifies that he is satisfactorily pursuing a full-time course of instruction leading to his degree. . . . "

Accordingly, petitioner was placed in Class II-S. As put by Judge Blackmun, the issue then "is whether [petitioner] may be deprived of that classification solely for a reason other than the discontinuance of his otherwise qualifying graduate study." App., *infra*, p. 16a. We believe the answer to that question must be "No". If petitioner in *Oestereich* could not be deprived of his exemption because the deprivation would violate a statutory command, then petitioner here cannot be deprived of his deferment because the deprivation would violate a constitutional command. That command is that a right bestowed by government cannot be withdrawn or withheld for arbitrary reasons or by arbitrary procedures.

The general rule can be analyzed from several points of view. Professor Van Alstyne in The Demise of The Right-Privilege Distinction in Constitutional Law, 81 Harv. L.

Rev. 1439 (1968), broke down the rule into three categories relevant here.

The first category is the "doctrine of unconstitutional conditions." "The doctrine would appear to apply . . . to every . . . case where the enjoyment of a government-connected interest [here, petitioner's II-S classification] is conditioned upon a rule requiring that one abstain from the exercise of some right protected by an express clause in the Constitution" [here, petitioner's right under the First Amendment to protest the war in Vietnam]. *Id.* at 1446. See *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Dixon* v. *Alabama State Bd. of Educ.,* 294 F. 2d 150 (5th Cir.), *cert. denied,* 368 U. S. 930 (1961).

The second category is described as "indirect effects and constitutional rights." " . . . [A] person whose status in the public sector is threatened by administrative action [here, petitioner's II-S classification] should have a right to a fair hearing to make certain that the action is not in fact being taken for reasons which are constitutionally improper." [See section 4, *infra,* p. 11, concerning the right to a due process hearing before petitioner may be punished for turning in his draft cards.] *Id.* at 1453. See *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 185 (1961); *Homer* v. *Richmond,* 292 F. 2d 719, 722 (D. C. Cir. 1961) ("One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law.")

The third category is equal protection. "Even a privilege, benefit, opportunity, or public advantage [here, petitioner's II-S classification] may not be granted to some but withheld from others where the basis of classification

and treatment is arbitrary." [Here, the arbitrary application of the Selective Service delinquency regulations.] See *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Douglas* v. *California*, 372 U. S. 353 (1963).

Given this analysis of the withdrawal of petitioner's II-S classification, the restrictive language of Section 10 (b)(3) ought not bar judicial review of petitioner's reclassification for, as stated above, its withdrawal violates a constitutional command. Furthermore, determination of the issues in this case, cast in the analysis above, does not concern the "exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved." *Oestereich* v. *Selective Service*, 37 U. S. L. Week 4054. In addition, the withdrawal of petitioner's deferment was based upon "conduct or activities unrelated to the merits of granting or continuing that [deferment]." *Ibid.*

For these reasons, certiorari should be granted to decide whether petitioner can contest his reclassification in a pre-induction civil suit notwithstanding the language of Section 10(b)(3).

2. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face or as applied.

The reasons for granting the writ to review this question are identical to the reasons set forth at pp. 13-15 of the petition for certiorari in *Breen* v. *Selective Service*, No. 1144, this Term. Petitioner respectfully refers the Court to that material.

3. Certiorari should be granted to settle the important question whether petitioner's declaration of delinquency, punitive reclassification, and order to report for induction, is authorized by statute or regulation.

In its brief in *Oesterreich,* the government conceded grave doubts concerning the validity of the delinquency procedures (p. 54):

> "It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt or deferred or whatever. Congress prescribed criminal prosecution for such violations, and also provided for exemptions and deferments for certain classes of individuals to reflect considerations of national interest apart from simply raising manpower for the Army. Termination of such status through delinquency reclassification may effectively undermine that congressional determination and thus be inconsistent wtih the Selective Service Act."

The government also granted that the unfettered discretion given to local boards under Reg. 1642.4(c) to restore a registrant's prior classification presented a serious question whether the regulations did not conflict with the Act (pp. 54-55). The possibility of constitutional infirmities was also recognized by the government including the delegation of power to local boards "without standards for the exercise of sweeping discretion given them by the regulations," and the "absence of any specified nexus or reasonable relationship between the violation which triggers re-

classification and induction, and the registrant's status vis-à-vis the Selective Service System [which] might be viewed as inconsistent with due process notions" (p. 56).

The government also referred not unfavorably to the opinion of Judge Dooling in *United States* v. *Eisdorfer*, 1 S. S. L. R. 3115 (E. D. N. Y. 1968), in which he observed that "The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges." *Id.* at 3116.

This Court in *Oestereich* recognized that "Congress did not define delinquency; nor did it provide any standards for its definition by the Selective Service System." *Supra* at 4054. The Court found, of course, that to whatever use the delinquency regulations might be put, revocation of statutory exemptions was not one of them. And, added the Court, "Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classification, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions." *Ibid.*

It is apparent, therefore, that there are serious and unresolved statutory and constitutional issues present which should be settled by this Court.

In addition, there are important issues of federal law involved in the question whether petitioner's delinquency, reclassification, and priority induction are authorized by the Selective Service Regulations themselves. Petitioner respectfully refers the Court to pp. 18-21 of the petition for certiorari in *Breen* v. *Selective Service*, No. 1144, this Term, where this argument is set forth.

4. **Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment and the Sixth Amendment.**

5. **Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague and overbroad.**

6. **Certiorari should be granted to decide whether petitioner's surrender of his Registration Certificate was an act of speech protected by the First Amendment.**

The reasons for granting the writ to review the issues in Sections 4, 5 and 6 are identical to the reasons set forth at pp. 15-17 and 21-26 of the petition for certiorari in *Breen* v. *Selective Service,* No. 1144, this Term. Petitioner respectfully refers the Court to that material.

CONCLUSION

For the reasons set forth above, the writ should be granted.

Respectfully submitted,

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March 19, 1969

APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19331

ROLF J. KOLDEN,

Appellant,

—v.—

SELECTIVE SERVICE LOCAL BOARD NO. 4,
Beltrami County, Minnesota,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

[January 28, 1969.]

Before:

MATTHES, GIBSON and BRIGHT,

Circuit Judges.

MATTHES, *Circuit Judge*:

Rolf J. Kolden, appellant, was at all pertinent times a graduate student at Harvard University, working for a Ph. D. degree. Until he turned in his draft card to an officer of the Government on October 16, 1967, at a meet-

ing protesting the Viet Nam War, appellant possessed a II-S classification (student deferment). On November 8, he informed his local draft board (Beltrami County, Minnesota) that he had surrendered his draft card. Pursuant to 32 C.F.R. §§ 1642.4(a) and 1642.12[1] the local board on December 1, 1967, declared appellant delinquent and reclassified him I-A for failure to comply with regulations 32 C.F.R. §§ 1617.1 and 1623.5, which require each registrant to have in his possession a Selective Service registration card and a notice of classification.

After a denial by the appeal board of appellant's timely appeal of his I-A classification, his local board ordered him to report for induction.[2] Subsequently, on February 22, 1968, appellant filed this action in the United States District Court for the District of Minnesota, first, for a temporary injunction to stay his induction into the Armed Forces and, second, upon a full hearing of his claim for a permanent injunction against his induction.

On April 9, the district court (Judge Lord) issued an order denying the motion for a temporary injunction on

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[1] Section 1642.4(a) provides:

"Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent."

Section 1642.12 in pertinent part provides:

"'Any delinquent registrant . . . may be classified in or reclassified into Class I-A, Class I-A-O or Class I-O, whichever is applicable, regardless of other circumstances . . .'"

[2] At the time of the filing of the complaint, appellant had received an Order to Report for Induction, SSS Form 252, but the date of induction had not yet arrived. The Order to Report for Induction was dated the same day as the notice of denial of appeal by the appeal board, February 1, 1968.

the grounds that a decision on the merits would require a review of the propriety of appellant's reclassification, and such review at that posture of the case is prohibited by § 10(b)(3) of the Military Selective Service Act, 81 Stat. 100, 50 U.S.C. App. 460(b) (3). From that order, Kolden appealed to this Court. While his appeal was pending, his local board ordered him to report for induction on July 17, 1968. He then petitioned Judge Lord for an injunction or stay pending his appeal. The petition was denied. On July 16, Judge Blackman of this Court, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, granted appellant's request for an injunction pending determination of his appeal to this Court. Judge Blackman further ordered that the appeal be expedited.[3]

Essentially, appellant contends his reclassification was illegal because: (1) the declaration that he was delinquent, his reclassification to I-A and his induction order are punitive in nature and impose punishment without due process of law; (2) the action by the board designating him a delinquent for failure to possess his draft card and reclassifying him I-A violated his freedom of speech protected by the First Amendment.

Section 10(b)(3) of the Military Selective Service Act, *supra*, precludes judicial review of any Selective Service classification prior to induction. Congress, through this statute, codified long-established prior case law. *Witmer* v. *United States*, 348 U.S. 375 (1955); *Estep* v. *United*

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[3] When this case was submitted in September, 1968, *Oestereich* v. *Selective Service System Local Bd. No. 11*, —— U.S. —— (December 16, 1968) and *Clark* v. *Gabriel*, —— U.S. —— (December 16, 1968), were pending in the Supreme Court. We concluded that the decision of the Supreme Court in *Oestereich* and *Gabriel* would probably be relevant to the issues in this case, and consequently we deferred our opinion.

States, 327 U.S. 114 (1946). Section 10(b) (3) in applicable part states:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

In *Oestereich* a local draft board, in face of a statutory mandate that divinity students were exempt from military service (§ 6(g) of the Military Selective Service Act, 50 U.S.C. App. 456(g)),[4] declared a divinity student a delinquent and reclassified him 1-A after he had returned his registration card to the Government. The Court held that the local board's action in depriving the student of a statutory exemption was "blatantly lawless," and in

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[4] This section reads as follows:

"Regular or duly ordained ministers of religion, as defined in this title, * * * and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled shall be exempt from training and service (but not from registration) under this title * * *"

such an instance § 10(b) (3) did not prevent the judiciary from restoring him to the classification to which he was legally entitled.

Speaking for the Court, Mr. Justice Douglas stated:

> "Since the exemption granted divinity students is plain and unequivocal and in no way contested here, and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed legislative standards, we conclude that preinduction judicial review is not precluded in cases of this type."

Restricting its decision to the particular facts of the case before it, the Court upheld the constitutionality of § 10(b) (3) in stating: "Our construction leaves § 10(b) (3) unimpaired in the normal operations of the Act."

In *Gabriel* a registrant claiming conscientious objector status sought to have his induction enjoined on the grounds that his I-A classification was without basis in fact, that the local board had misapplied the statutory definition of conscientious objector and that members of his board were prejudiced against conscientious objectors. The district court granted registrant a preliminary injunction and held § 10(b) (3) unconstitutional on the basis that it deprived a person of any meaningful review. The Supreme Court reversed the district court's holding and pointed out that local boards possess statutory discretion to make proper classifications, evaluate evidence and determine whether a claimed exemption is deserved. The Court, in summary, stated:

> "To allow pre-induction judicial review of such determinations would be to permit precisely the kind of

'litigious interruptions of procedures to provide necessary military manpower' (113 Cong. Rec. 8052 (June 12, 1967) (report by Senator Russell on Conference Committee action) which Congress sought to prevent when it enacted § 10(b) (3).

"We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction. *Estep* v. *United States,* 327 U.S. 114 (1946). *Falbo* v. *United States,* 320 U.S. 549 (1944)." —— U.S. at ——.

The question we must now decide is whether in light of *Oestereich* and *Gabriel,* § 10(b) (3) bars judicial review of appellant's local board's action in reclassifying him I-A. Because appellant did not possess a statutorily-required deferment, but one granted only by the discretion of the local board, we hold that § 10(b) (3) bars review at this stage of the Board's actions.

This case, unlike *Oestereich,* centers around appellant's classification under § 6(h), 50 U.S.C. App. § 456(h), which does allow the local board discretion in granting deferments. Basically, this section provides for deferments for (1) undergraduate college students; (2) persons engaged in certain occupations vital to the national health, safety or interest; (3) graduate students; (4) certain persons who have others dependent upon them for support; (5) fathers with families.

Section 6(h) makes a distinction between deferments for undergradute students and those for graduate students. The statute *requires* the President to provide for undergraduate deferments except in time of necessity, but only *authorizes* him to do so for graduate students.

In applicable part § 6(h) (1) states:

> "Except as otherwise provided in this paragraph, the President *shall*, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. *No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest.*" (Emphasis added.)

The section clearly mandates deferments for full-time undergraduate students, but further provides that no person who has been deferred as an undergraduate student and has since been graduated shall again be deferred. The statute, however, does provide for an exception which allows but does not require deferments for graduate study necessary to the national health, safety or interest.

Thus it is apparent that § 6(h) (1), when considered in relation to § 6(h) (2), to which it logically refers, clearly reveals that Congress has made graduate deferments rest upon the discretion of the local boards. The latter section, in pertinent part, states:

> "Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment * * * *or whose activity in graduate study, research or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest: Provided, That no person within any such category shall be deferred except upon the basis of his individual status* * * *." (Emphasis added.)[5]

Thus, if appellant here had been an undergraduate student duly possessing a II-S classification who had been reclassified I-A for reasons other than ceasing to be a

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[5] The regulations promulgated pursuant to § 6(h) further illustrate the distinction between the statutorily required undergraduate deferment and the statutorily permitted graduate deferment. 32 C.F.R. § 1622.25 and § 1622.26.

full-time student in good standing, the case would be more closely analogous to *Oestereich's* situation.[6] But where, as here, a registrant is deprived of a deferment that had been granted as a matter of administrative grace in the first instance, the courts can review the classification only in a criminal prosecution or a habeas corpus proceeding. In addition to *Oestereich* and *Gabriel*, see, for example, *Breen* v. *Selective Service Local Bd. No. 16*, 284 F.Supp. 749 (D. Conn. 1968), *aff'd*, —— F.2d —— (2d Cir. Jan. 10, 1969); *Carpenter* v. *Hendrix*, 277 F.Supp. 660 (N.D. Ga. 1967); *Moskowitz* v. *Kindt*, 273 F.Supp. 646 (E.D. Pa. 1967), *aff'd*, 394 F.2d 648 (3d Cir. 1968); *Muhammed Ali* v. *Connally*, 266 F.Supp. 345 (S.D. Texas 1967); *United States* v. *Lybrand*, 279 F.Supp. 74 (E.D. N.Y. 1967).[7]

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[6] Since the question is not before us we refrain from expressing an opinion as to whether § 10(b) bars judicial review of a board's reclassification of *undergraduate* students from II-S to I-A for becoming delinquent. The Government in its brief argues that cases involving deferments under § 6(h) should be barred from review by § 10(b) (3) since § 6(h) authorizes deferments "under such rules and regulations as [the President] may prescribe." The Government argues that this grant of authority to prescribe rules and regulations is sufficiently broad to encompass the regulations establishing a delinquency procedure as well as the regulation specifying the circumstances under which deferments will be granted. It further contends that the Supreme Court's denial of stay in *Shiffman* v. *Selective Service Bd. No. 5*, 391 U.S. 930 (1968), represents an acceptance of this distinction. In *Shiffman*, registrant, who was declared a delinquent when he destroyed his draft card, and was reclassified from II-S to I-A, was denied an injunction against his induction on the basis of § 10(b) (3). See also a companion case, *Zigmond* v. *Selective Service Bd. No. 16*, 391 U.S. 930 (1968). *Contra*, *Kimball* v. *Selective Service Local Bd. No. 15*, 283 F.Supp. 606 (S.D. N.Y. 1968).

[7] On January 14, 1969, the Supreme Court, by per curiam, affirmed *Boyd* v. *Clark*, United States District Court, S. Dist. N.Y., holding that § 10(b) (3) bars court, prior to registrants' induction, from entertaining their suit challenging constitutionality of § 6(h) (1)'s student deferment provision. —— U.S. —— (37 Law Week No. 27 at 3241 and 3246).

Thus, we hold simply that appellant does not fall within the statutory exemption exception to § 10(b) (3) as laid down in *Oestereich,* and that appellant may not test the validity of the board's action in this proceeding. Since we are precluded at this time from reviewing the propriety of appellant's classification, we do not reach the merits of his contentions.

In summary, based upon the rationale of *Oestereich* and *Gabriel,* the time has not arrived for appellant to challenge the validity of his reclassification. Consequently, we affirm the denial of the temporary injunction and direct the district court to dismiss the action.

Order Granting Injunction Pending Appeal

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19,331

ROLF J. KOLDEN,

Appellant,

—VS.—

SELECTIVE SERVICE LOCAL BOARD NO. 4,
BELTRAMI COUNTY, MINNESOTA,

Appellee.

The application of Rolf J. Kolden, the appellant herein, for an injunction to restrain the enforcement of an order of the appellee requiring Kolden to report for induction on July 17, 1968, came duly on for hearing before the undersigned, a Judge of the United States Court of Appeals for the Eighth Circuit, on July 16, 1968, at Rochester, Minnesota. The appellant appeared by Chester Bruvold of Minneapolis, Minnesota, and by John S. Connolly of Saint Paul, Minnesota. The appellee appeared by Earl Cudd, Assistant United States Attorney for the District of Minnesota.

After having examined and reviewed the record and the application submitted, and having heard the argument of counsel, it appeared that:

1. On April 9, 1968, the Honorable Miles W. Lord, United States District Judge for the District of Minnesota, issued

his order denying Kolden's motion for a preliminary injunction.

2. On April 11, 1968, Judge Lord, pursuant to Rule 60, Fed. R. Civ. P., in writing amended said order by the correction of one word therein.

3. On April 19, 1968, Kolden, pursuant to then Rule 73, Fed. R. Civ. P., filed his notice of appeal, from the denial of his motion for a preliminary injunction, to the United States Court of Appeals for the Eighth Circuit.

4. On July 2, 1968, the appellee issued to Kolden its Notice of New Reporting Date for Induction or Armed Forces Physical Examination requiring him to report at Bemidji, Minesota, at five p.m. on the 17th day of July, 1968.

5. On July 15, 1968, Kolden presented his Application for Writ of Injunction or Stay Pending Review on Appeal to Judge Lord and requesting that the order requiring him to report on July 17 be enjoined or stayed pending the decision of his appeal and final disposition of his case.

6. Upon hearing, Judge Lord denied said application without supporting memorandum.

7. The application to the undersigned was then presented.

8. The submission of the application to a panel or division of this court is impracticable due to the requirements of time and the fact that the judges of this court nearest to Minneapolis and Saint Paul, Minnesota, are in Fargo,

North Dakota, Duluth, Minnesota, and Rochester, Minnesota, respectively, and cannot conveniently be called together, and it is therefore an exceptional situation which may properly be made to and considered by a single judge of this court, within the meaning and application of Rule 8 or the Federal Rules of Appellate Procedure. However, the matter has been reviewed by the undersigned by telephone with the Honorable Charles J. Vogel, Senior Circuit Judge of this court, and Judge Vogel joins in the issuance of this order.

9. The district court by its order of April 9, 1968, found:

> "The facts of this case are simple. Kolden is a graduate student at Harvard University. On October 16, 1967, Kolden turned over his draft card to an officer of the United States Government. On November 8, 1967, Kolden wrote to his Selective Service Local Board informing it that he had turned in his draft card. On December 1, 1967, the defendant Selective Service Local Board declared Kolden delinquent because of his failure to comply with regulations 1617.1 and 1623.5 which require each selective service registrant to have in his possession a Selective Service registration card and a Notice of Classification."

10. It is further represented that Kolden is in his third year of graduate work at Harvard; that he is working for his Ph.D. degree; that he attained the age of 26 in February 1968; that he possessed a II-S classification until he was declared delinquent by the appellee on December 1, 1967, and reclassified I-A; that he filed a timely appeal of that I-A classification; and that this was denied by the

Appeal Board February 1, 1968, and his 1-A reclassification affirmed:

11. Kölden is ordered by the appellee to report for induction or armed forces physical examination on July 17, 1968.

On May 20, 1968, the Supreme Court of the United States granted certiorari in its then No. 1246 (No. 46 on the 1968-69 Docket), Oestereich v. Selective Service System Local Board No. 11, ——— U.S. ———, 36 L.W. 3437. The United States District Court for the District of Wyoming had denied Oestereich's motion for a temporary restraining order, 280 F. Supp. 78. The Tenth Circuit had affirmed by a per curiam order "for the reasons set forth in the memorandum decision of the trial court", 390 F. 2d 100. In *Oestereich*, the Solicitor General suggested, in his memorandum filed with the Supreme Court, that Oestereich, who was a fulltime student in a recognized divinity school, enjoyed a statutory exemption under 50 U.S.C. App. § 456(g); that the language of Pub. L. 90-40, amending § 460(b)(3), effective June 30, 1967, confining judicial review of a classification by a local board, may possibly be construed to exclude board action contrary to a statutory exemption; that although the question of the board's power to disregard the statute could be raised in defense to a criminal prosecution or in a habeas corpus proceeding after induction, this "is a very heavy burden to put on the citizen if the board has in fact acted contrary to the terms of the statute". Such is the posture of the Oestereich case now pending in the Supreme Court.

A similar situation is presented in Kimball v. Selective Service Local Board No. 15, 283 F. Supp. 606 (S.D.N.Y. 1968). There the plaintiff was a fulltime undergraduate

college student and entitled to deferment, because of that fact, under 50 U.S.C. App. § 456(h)(1), as amended by Pub. L. 90-40. The court referred to the Oesterreich situation and the Solicitor General's memorandum there, and concluded that the distinction attempted to be drawn by the government between an exemption under § 456(g) and a deferment under § 456(h) "is one without legal significance". It enjoined the induction of that plaintiff pending full determination of the issues of fact and law.

Compare, however, the Supreme Court's denial of certiorari on May 27, 1968, in Shiffman v. Selective Service Board No. 5, 36 L.W. 3451, and Zigmond v. Selective Service Local Board No. 16, 36 L.W. 3451, with Mr. Justice Douglas dissenting.

It is, of course, recognized that classification orders are usually to be reviewed when raised as a defense in a criminal proceeding. See Witmer v. United States, 348 U.S. 375 (1955). Further, the courts have been reluctant to scrutinize judicially any phase of the operation of the selective service system. Wolff v. Selective Service Local Board No. 16, 372 F. 2d 817, 822 (2 Cir. 1967).

Concededly, Kolden does not enjoy a statutory exemption of the kind to which Oesterreich may be entitled under § 456(g). Neither does he now enjoy an undergraduate deferment of the kind to which Kimball may be entitled under § 456(h)(1). Nonetheless, § 456(h)(2), after the 1967 amendment, also provides:

> "No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under subsection (a) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under

regulations governing hardship deferments), *or for graduate study*, occupation, or employment necessary to the maintenance of the national health, safety, or interest." (Emphasis supplied.)

Further, the regulations, 32 C.F.R., provide:

"32 C.F.R. 1622.26 Class II-S: Registrant Deferred Because of Activity in Graduate Study . . .

"(b) Any registrant who is entering his second or subsequent year of post-baccalaureate study, without interruption on October 1, 1967, may be placed in Class II-S if his school certifies that he is satisfactorily pursuing a full-time course of instruction leading to his degree; but such registrant shall not be deferred . . . [for] a course of study leading to doctoral or professional degree or the equivalent (or combination of master's and doctoral degrees) for more than a total of five years, including any of the years already used in such course of study, or for one additional year, whichever is greater. . . ."

It therefore appears that Kolden's receipt of his II-S classification originally was made in conformity with the provisions of the Act and of the regulations, both heretofore quoted. If this is so, the issue then presented is whether he may be deprived of that classification solely for a reason other than the discontinuance of his otherwise qualifying graduate study.

We are sufficiently satisfied that Kolden's case presents enough factual similarity to the cases of *Oestereich* and *Kimball* to justify, in the light of the decision in *Kimball* and of the Supreme Court's granting of certiorari in *Oe-*

reich, injunctive relief pending disposition of his appeal. Eventually, on the merits, of course, Kolden must establish the jurisdictional amount required under 28 U.S.C. § 1331 (a), and which he has alleged in his complaint, or otherwise appropriately establish federal court jurisdiction.

We are also satisfied that Kolden, if relief is not now granted to him, is subject to irreparable injury and that, in contrast, the appellee, if relief is granted, will be subject to little, if any, injury.

It is desirable that this case be advanced for hearing.

Accordingly, it is ordered that Kolden's induction be and hereby is enjoined pending determination of his appeal to this court. This relief, however, is conditioned upon Kolden's filing of his appendix and brief with the Clerk of this court no later than August 6, 1968. The responsive brief shall then be filed, as Rule 31 (a), Fed. R. App. P., provides, within 30 days after service of Kolden's brief.

It is further ordered that the Clerk of this court shall place said appeal on the calendar of this court for oral argument, if desired, and for submission at the September session scheduled for the week of September 9, 1968.

Inasmuch as a cost bond on appeal has been filed, no additional bond under Rule 8(b), Fed. R. App. P., is required.

Dated at Rochester, Minnesota, this 16th day of July, 1968.

HARRY A. BLACKMUN
Judge of the United States Court
of Appeals for the Eighth Circuit

United States District Court, District of Minnesota, Memorandum Decision of Hon. Miles Lord, U.S.D.J.

This is a civil action brought by Rolf J. Kolden against Selective Service Local Board No. 4, Beltrami County, Minnesota. Now before the Court is the plaintiff's motion for preliminary injunction.

The facts of this case are simple. Kolden is a graduate student at Harvard University. On October 16, 1967, Kolden turned over his draft card to an officer of the United States Government. On November 8, 1967, Kolden wrote to his Selective Service Local Board informing it that he had turned in his draft card. On December 1, 1967, the defendant Selective Service Local Board declared Kolden delinquent because of his failure to comply with regulations 1617.1 and 1623.5 which require each selective service registrant to have in his possession a Selective Service registration card and a Notice of Classification. These are the cards commonly referred to as draft cards. On February 1, 1968, following the denial of appeal from the classification, the defendant Selective Service Local Board mailed to Kolden an order to report for induction. This complaint and motion for preliminary injunction followed.

Decision on the merits on the issues raised by the complaint requires a review of the propriety of the reclassification. Since it is apparent, however, that such issues are not now justiciable and the review requested cannot at this time be granted, the motion must be denied.

As a general rule, classification orders may be reviewed only when raised as a defense in criminal proceedings. *Hitchcock v. United States*, 348 U.S. 375, 75 S. Ct. 392, 79 L. Ed. 428 (1955). The basic reason for this rule is the need of

the administrative process to function with a minimum of interference. The courts are especially reluctant to interfere when a subsequent administrative action may make moot the matter then before the court. Nor will the courts hear a cause when the action complained of has not caused, or is not certain to cause injury to the complaining party. *Wolff v. Selective Service Board No. 16*, 372 F. 2d 817 (1967). In this particular case, Kolden may not pass the induction examinations and the issues here raised would become moot.

This restraint on judicial review which had been a matter of case law, is now a matter of statutory law in the selective service area. 50 U.S.C. App. 460(b) (3) which became effective in June, 1967, reads in part:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form . . .

In several recent cases in which review of classification has been requested at this same stage of the selective service process, such review has been decided. In two of these cases the facts were essentially similar to those of the instant case. See *Breen v. Selective Service Board No. 16*, 30 U.S.L. Week 2597 (D. Conn. March 13, 1968) and *Oesterreich v. Selective Service System Local Board No. 11*, No. 9902, 9th Cir., Feb. 21, 1968. See also *MacKouse v. Kindt*, 275 F. Supp. 646 (E.D. Pa. 1967).

In one often cited case, *Wolff* v. *Selective Service Board No. 16*, *supra*, review was granted at a similar stage in the selective service procedure. That case, however, was decided prior to the enactment of the statute just quoted. Moreover, the *Wolff* case involved reclassification resulting from participation in a protest demonstration. The court was there concerned particularly with the "chilling"-effect on free speech which might result from the classification.

The current status of the *Wolff* case is uncertain. While there may yet be some circumstances in which judicial review might be granted at this stage, this is not one. The Court does not decide at this time that the return of the draft card under these circumstances is symbolic speech protected by the First Amendment. However, see *O'Brien* v. *United States*, 376 F. 2d 538 (1st Cir. 1967) in which the court upheld a criminal conviction for non possession of a draft card in the face of an argument that the card has been destroyed as an exercise of free speech.

Without deciding on the propriety of the reclassification at this stage, the existence of the regulations requiring the registrant to carry the draft card provide a standard which permits the registrant to know exactly what conduct will result in Board action and as such, the far reaching "chilling effect" feared by the court in *Wolff* is not present in the instant case.

On some occasions courts have reviewed classifications at this stage where it is clear that there was no basis in fact for the classification (now provided for in the statute), where no opportunity to contest the classification was allowed or where a board acted in clear violation of its own regulations. None of these circumstances exist in the instant case.

The Court wishes to make clear that no determination on the merits has been made. The Court has determined only that considering the statute limiting review and the long established case law, this Court may not review this matter at this time.

For this reason, the motion is hereby DENIED.

MILES W. LORD
United States District Judge

Dated: April 9, 1968

(Filed Apr. 10, 1968. Frank A. Massey, Clerk, by Hazel E. Gabrielson, Deputy.)

AMENDMENT TO ORDER

Attorneys for Plaintiff: Joseph Perry, John S. Connolly, Reese C. Johnson, Peter Dorsey, John R. Goetz, Chester Bruvold, Sherman Bergstein, Thomas A. Keller III, Esqs.

Attorney for Defendant: Patrick J. Foley, United States Attorney, Minneapolis, Minn.

Under the power granted by Rule 59, Federal Rules of Civil Procedure, the order in the instant case is hereby amended as follows:

On page 3, following the quotation of 50 U.S.C. App. 460 (b) (3), the first sentence to be changed from: "In several recent cases in which review of classification has been requested at this stage of the selective service process, such

Military Selective Service Act of 1967

Section 10(b)(3), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 460(b)(3):

No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 6(h)(2), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 546(h)(2):

(2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment in industry, agriculture, or other occupations or employment, or whose continued service in an Office (other than an Office described in subsection (f)) under the United States or any State, territory, or possession, or the District of Columbia, or whose activity in graduate study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors

is found to be necessary to the maintenance of the national health, safety, or interest: *Provided*, That no person within any such category shall be deferred except upon the basis of his individual status: *Provided further*, That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferrable under any other provisions of this Act."

Selective Service Regulations

Selective Service Regulation 1622.26 Class 1-S; Registrant Deferred Because of Activity in Graduate Study. (a) In Class 1-S shall be placed any registrant who is satisfactorily pursuing a course of graduate study in medicine, dentistry, veterinary medicine, osteopathy or optometry, or in such other subjects necessary to the maintenance of the national health, safety, or interest as are identified by the Director of Selective Service upon the advice of the National Security Council.

(b) Any registrant who is entering his second or subsequent year of post-baccalaureate study without interruption on October 1, 1967, may be placed in Class 1-S if his school certifies that he is satisfactorily pursuing a full-time course of instruction leading to his degree; but such registrant shall not be deferred for a course of study leading to a master's degree or the equivalent for more than one additional year, or for a course of studying leading to a doctoral or professional degree or the equivalent (or combination of master's and doctoral degrees) for more than a total of five years, inclusive of the years already used in such course of study, or for one additional year, whichever is greater. Any registrant enrolled for his first year of post-baccalaureate study in a graduate school or a professional school on October 1, 1967, or accepted for admission involving enrolled status on October 1, 1967, may be placed in Class 1-S if he has entered the first class commencing after the date he completed the requirements for admission and shall be deferred for one academic year only, or until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.